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No. 02-1529

Supreme Court, U.S.
FILED
AUG 2 8 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RUBEN GOMEZ-CHAVEZ,

Petitioner,

v.

BRIAN PERRYMAN, District Director,
and the
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

LAW OFFICES OF KAMELI & ASSOCIATES, P.C.
TAHER KAMELI, ESQ.
220 South State Street
Suite 2026
Chicago, Illinois 60604
(312) 427-4529
Attorney of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR PETITIONER

The brief in opposition filed by the Respondents contains no effective response to Petitioner's compelling showing that certiorari is warranted in this case.

1. Respondents first contend that the claim that 8 U.S.C. § 1231(a)(5) is unconstitutional "raises no general importance that would warrant this Court's review." Respondents' Brief at 9 [hereinafter Res. ___]. Respondents further state that, "the court of appeals did consider and reject, in the context of the petition for review proceeding, Petitioner's claim that Section 1231(a)(5) is unconstitutional." Res. 9. Respondents' submission rests on the contention that the preclusion of review is unproblematic because it concerns simply a "procedural distinction." Res. 9.

As we explained in our opening brief (at 9), Petitioner was not only attempting to force the Attorney General to adjudicate his BCIS form I-212 (the mandamus count), but was also attempting to challenge the constitutionality of 8 U.S.C. § 1231(a)(5). Still, Respondents further contend that the court of appeals did consider on the merits Petitioner's constitutional argument in the petition for review proceeding. Res. 9. Yet the entire complaint was dismissed for lack of jurisdiction and affirmed by the court of appeals, which noted that Petitioner could not avoid § 1252(g)'s jurisdictional bar by recharacterizing a claim as a request for a writ of mandamus. (App. 6a). Respondents mischaracterize the review of the constitutionality of 8 U.S.C. § 1231(a)(5), precisely because there was no review, the entire complaint was dismissed for lack of jurisdiction under § 1252(g) and the constitutionality claim was ignored.

Following *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169 (9th Cir. 2001), a Petitioner is entitled to receive one full and fair hearing of his removal. In *Alvarenga-Villalobos*, the Petitioner had received one full and fair hearing before the Bureau of Immigration and Naturalization Services (hereinafter "BCIS"), and formally known as INS, imposed the first order of removal and therefore the court rejected his challenge to his reinstated deportation order. *Alvarenga-Villalobos*, 271 F.3d at 1169-1174. Here, the Petitioner has never had any form of judicial review of his case. In *Alvarenga-Villalobos*, the court referred to an earlier U.S. Supreme Court case, *Mendoza-Lopez*, 481 U.S. 828, 841 (1987) stating, "*Mendoza-Lopez* requires judicial review of a deportation in a subsequent proceeding only when the alien was deprived of the right to judicial review in his initial proceeding." *Alvarenga-Villalobos*, 271 F.3d at 1172 (citing *Mendoza-Lopez*, 481 U.S. 828, 841 (1987)). In the instant case, the Petitioner has been denied his right of judicial review of his claims.

2. Respondents contend that the Petitioner does not explain how injury he suffered by the application of § 1231(a)(5) Res. 10. Yet, in order to demonstrate prejudice, an alien need not show that a hearing necessarily would afford relief. *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000).

Furthermore, in *Alvarenga-Villalobos*, the Ninth Circuit Court of Appeals upheld the Attorney General's reinstatement because the alien *had a hearing prior to his deportation*. *Alvarenga-Villalobas v. Ashcroft*, 271 F.3d

1169 (9th Cir. 2001) (emphasis supplied).[1] In contrast Petitioner here never had any type of hearing.

In *Padilla v. Ashcroft*, No. 02-70430, 2003 WL 21499281, the alien was "inadmissible in that, following deportation [she] re-entered the United States without the permission of the Attorney General." *Padilla*, 2003 WL 21499281, *3 (9th Cir.) (Berzon, concurring). However, the concurrence states:

> A request for permission to reapply for entry, *see* 8 C.F.R. §§ 212.2(a); 212.2(e), might have cured Padilla's inadmissibility premised on her illegal reentry, but no such request was ever filed with the district director. As a result, Padilla has not shown that she was prejudiced by the failure to afford her a hearing prior to the reinstatement, because she does not identify a plausible claim for opposing removal pursuant to reinstatement.

Id.

In contrast in the instant case, on or about May 11, 1999 Petitioner's wife filed with the BCIS a from I-130 petition to classify the status of the Petitioner as an immediate family member of a United States citizen pursuant to the provisions of Section 245(a) of the Immigration

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[1] In *Padilla v. Ashcroft*, No. 02-70430, 2003 WL 21499281, the Court noted of *Alvarenga-Villalobos*: "Even assuming that *Alvarenga-Villalobos v. INS*, 271 F.3d 1169, 1174 (9th Cir.2001), interprets 8 C.F.R. § 241.8(a) to require a full and fair hearing with respect to the original order of exclusion, deportation, or removal that is being reinstated, Petitioner cannot show prejudice. That is so because, as we have emphasized above, she does not challenge her original removal; a hearing concerning it therefore could not help her." *Padilla*, 2003 WL 21499281, *3 n.2 (9th Cir.).

and Nationality Act, as amended, 8 U.S.C. § 1255(a). Simultaneously, the Petitioner and his U.S. citizen spouse filed with the BCIS a form I-485 application along with other forms to adjust Petitioner's status to that of an alien lawfully admitted for permanent residence, pursuant to the provisions of Section 245 of the aforesaid Act, 8 U.S.C. § 1255. On or about July 25, 2001 the Plaintiff filed an application for permission to reapply for admission into the United States after removal (I-212). As a result Petitioner has shown he was prejudiced by the failure to afford him a hearing prior to the reinstatement because he has identified a plausible claim for opposing removal pursuant to the reinstatement.[2]

The Respondents' claim (Res. 10) that Petitioner has not demonstrated injury from the application of Section 1231(a)(5), merely analyzes the reinstatement procedure. Yet, as noted in *Padilla*, the court in *Prado Hernandez v. Reno* held that the BCIS can and should consider on its merits a fully-perfected application for adjustment of status filed before reinstatement proceedings are instigated. *Padilla*, 2003 WL 21499281, *5 (9th Cir.) (citing *Prado Hernandez v. Reno*, 86 F.Supp.2d 1037 (W.D.Wash.1999)).

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[2] 8 C.F.R. § 212(e) states: "An applicant for adjustment of status under section 245 of the Act and part 245 of this chapter must request permission to reapply for entry in conjunction with his or her application for adjustment of status. *This request is made by filing an application for permission to reapply, Form I-212, with the district director having jurisdiction over the place where the alien resides.* If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceedings before an immigration judge, the district director must refer the Form I-212 to the immigration judge for adjudication." (Emphasis added).

Just as the Petitioner in the instant case had done, the Petitioner in *Prado* had applied for adjustment of status prior to the BCIS move to reinstate the deportation order. *Id.* (citing *Prado*, 86 F.Supp.2d at 1041). The *Prado* Petitioner and his wife were interviewed by the BCIS and it was discovered that the Petitioner has previously been deported. *Prado*, 86 F.Supp.2d at 1037. The *Prado* Petitioner then submitted Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, and was released on bond. *Id.* The court in *Prado* held that, "[t]he language of Section 241(a)(5), therefore, is not bar to considering the application." *Padilla*, 2003 WL 21499281, *5 (9th Cir.) (citing *Prado*, 86 F.Supp.2d at 1041).

Under the Immigration and Naturalization Act § 245(i), non-citizens who have previously been removed from this country and subsequently reenter may nonetheless apply for adjustment of status. Consent must be obtained from the Attorney General to apply for readmission after removal under 8 C.F.R. § 212.2. The Petitioner may bring his or her adjustment application along with the application for permission to reapply, under 8 C.F.R. § 212.2, before an immigration court. 8 C.F.R. § 212.2 states, "If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceeding before an immigration judge, the district director must refer the Form I-212 (Application for Permission to Reapply for Admission into the United States After Deportation or Removal) to the immigration judge for adjudication." 8 C.F.R. § 212.2(e). Therefore, the Petitioner in this instant case has demonstrated a plausible ground for relief.

CONCLUSION

For the reasons set forth above and in our opening brief, Petitioner RUBEN GOMEZ-CHAVEZ respectfully requests this Honorable Court to GRANT his Petition for a Writ of Certiorari.

Respectfully submitted,

TAHER KAMELI, ESQ.
LAW OFFICES OF KAMELI & ASSOCIATES, P.C.
220 South State Street
Suite 2026
Chicago, Illinois 60604
(312) 427-4529
Attorney of Record for Petitioner